

§1944.234

7 CFR Ch. XVIII (1–1–05 Edition)

are customary for the area and needed for marketability.

(2) Mixed income complexes may include nonessential common facilities such as swimming pools provided:

(i) The facility is not financed with RHS funds,

(ii) The complex is able to support the facility's operating and maintenance costs through collection of a user fee from tenants who subscribe to the service, and

(iii) The facility is designed and operated with appropriate safeguards for tenant health and safety.

(d) *Borrower contribution and return on investment.* (1) The minimum required borrower contribution will be based on the RHS loan amount and determined in accordance with §1944.213(b).

(2) For limited profit borrowers, additional funds exceeding the minimum required contribution that are provided from the borrower's own resources (not loans or grants from other sources) may be included in the borrower's initial investment, for purposes of determining return on investment, as provided in §1944.215(n).

(3) A loan from the borrower to the project may be considered, provided the loan proposal meets all conditions of this section and the loan to the project is from the borrower's own resources. LIHTC proceeds may be considered the borrower's own resources as provided in §1944.215(n)(1).

(e) *Reserve requirements.* RHS reserve requirements (the annual reserve requirement and the fully funded reserve amount) will be determined on a case-by-case basis, taking into consideration the reserve requirements of the other participating lenders, so that the *aggregate* fully funded reserve amount established by RHS and the other lenders equals at least 10 percent of the project's total development cost (TDC) or appraised value, whichever is greater. For example, if the other lenders do not have reserve requirements, RHS will establish its reserve requirements to meet the full aggregate amount (at least 10 percent of the TDC or appraised value of the project, whichever is greater), regardless of the RHS loan amount. On the other hand, if the other lenders have aggregate reserve requirements equal to or higher than the min-

imum 10 percent of TDC or appraised value required by RHS, and the amount is sufficient to meet project needs based on its capital improvement plan, it may not be necessary for RHS to establish additional reserve requirements. Reserve requirements and procedures for reserve withdrawals should be agreed upon by all lenders and included in the intercreditor or participation agreement referenced in paragraph (g) of this section.

(f) *Security requirements.* (1) RHS will take a first or parity lien in all instances where the Agency's participation is 50 percent or more.

(2) If RHS participation is less than 50 percent, every effort should be made to obtain a parity lien position. If a parity lien cannot be negotiated, an exception may be requested to accept a second lien position in accordance with §1944.240. The State Director will submit requests to accept a second lien position to the Deputy Administrator, Multi-Family Housing with comments and recommendations.

(3) RHS will take a first lien on project revenue from rent or occupancy payments; RHS, State, or private RA payments; and operating and reserve accounts.

(g) *Participation agreement.* RHS will enter into a participation (or intercreditor) agreement with the other lenders that clearly defines each party's relationship and responsibilities to the others.

[62 FR 25075, May 7, 1997, as amended at 62 FR 67223, Dec. 23, 1997]

§1944.234 Actions prior to loan approval.

Prior to loan approval the application will be reviewed for continued eligibility. The applicant may be required to submit updated information at that time.

[62 FR 25076, May 7, 1997]

§1944.235 Actions subsequent to loan approval.

(a) *Precommitment or closing actions.* After loan approval, the loan docket will be processed to the stage where a construction loan would normally be

closed prior to the start of construction. During this processing, the following actions should be taken:

(1) FmHA or its successor agency under Public Law 103-354 will obtain closing instructions from OGC in accordance with the requirements of subpart B of part 1927 of this chapter and §§ 1944.236(a) and 1944.236(b)(4) of this subpart.

(2) Ensure that the servicing office has on file evidence that a deposit has been made to the general operating account of an amount of initial operating capital sufficient to cover the expected start-up costs.

(3) The applicant will provide evidence indicating the terms and final arrangements for interim financing.

(4) The applicant will certify as to the availability or non availability of other government assistance as defined in § 1944.205 of this subpart immediately prior to loan closing. If other government assistance becomes available prior to loan closing, the loan amount will be decreased in accordance with paragraph (e)(3) of this section.

(b) *Transfer of obligations.* The transfer of fund obligations may occur only when:

(1) *Organizational entity remains the same.* The entity remains legally the same but a substitution of the members occurs. All or part of the membership may change as long as eligibility is not affected. The project site location and market must remain the same.

(2) *Organizational entity changes.* The membership and their interests remain identical, the project site location and market are the same, but the legal entity changes.

(3) Monetary default by original applicant/entity. An obligation may be transferred to any person or applicant eligible to receive an RRH loan when the original applicant/entity is in monetary default which has or may result in foreclosure by the interim lender, and:

(i) The applicant/entity assuming the obligation, or the interim lender, removes any liens filed against the property;

(ii) There have been no deviations from the FmHA or its successor agency

under Public Law 103-354 approved plans and specifications;

(iii) The transferee will not be composed of any principals of the transferor;

(iv) The transfer will be in the best interest of the FmHA or its successor agency under Public Law 103-354 and prospective tenants;

(v) The applicant/entity and all members thereof whose obligations are transferred will not be considered eligible for further participation in the RRH program for at least 5 years from the date of the transfer of the FmHA or its successor agency under Public Law 103-354 loan obligation; and

(vi) Prior approval is obtained from the National Office.

(c) *Financing during the construction period—(1) Interim financing.* When the amount of the loan exceeds \$50,000, the applicant may obtain interim financing from commercial or public sources for the construction period if it can be obtained at reasonable interest rates, fees, and terms, and in the best financial interests of the Government. Interim financing will be obtained to preclude the necessity for multiple advances of FmHA or its successor agency under Public Law 103-354 funds. The interim lender must be authorized to operate in the State in which the project will be located and must have an established record of providing financing to entities other than FmHA or its successor agency under Public Law 103-354-financed projects. Since the interim lender is responsible for inspecting construction along with FmHA or its successor agency under Public Law 103-354, the borrowing entity (including any of its identity of interest entities) cannot provide interim financing to its own project. Interim financing will be used subject to the following:

(i) FmHA or its successor agency under Public Law 103-354 will proceed as if FmHA or its successor agency under Public Law 103-354 funds had been advanced from the standpoint of approving construction contracts, inspection of construction and assuring compliance with applicable equal opportunity and nondiscrimination.

(ii) The guide letter shown as exhibit B of this subpart will be used to inform

a proposed interim lender that a specified amount of funds have been obligated and will be available to retire the interim financing if the applicant complies with the approval conditions, the builder's performance is acceptable and all construction bills are paid.

(iii) Since FmHA or its successor agency under Public Law 103-354's commitment to the applicant is contingent upon acceptable performance by the builder and payment of all construction bills, the interim lender should be advised of the additional risk involved if the builder is unable to provide, or the interim lender does not require a payment and performance bond. Although partial payments to the builder constructing the project by the contract method of construction must be made in accordance with the approved construction contract, the interim lender should not be permitted to make disbursements of more than 90 percent of the value of acceptable work in place.

(iv) Any cash for land purchase or development that is to be furnished by the applicant in fulfillment of the applicant's contribution requirement in § 1944.213(b) of this subpart must be placed on deposit with the interim lender and disbursed prior to any disbursement of interim loan funds. Obligations incurred prior to loan closing and the start of construction will be handled in accordance with § 1944.213(d) of this subpart.

(v) A supervised bank account need not be established for funds obtained through interim financing except for any small amounts held to complete construction so loan funds can be fully advanced and AED can be established. However, in order to assure that funds are requested and used for authorized purposes, requests for partial payments will be submitted through the servicing official on Form FmHA or its successor agency under Public Law 103-354 1924-18, "Partial Payment Estimate," or other professionally recognized form containing the certifications of the architect, applicant and FmHA or its successor agency under Public Law 103-354 representative shown on Form FmHA or its successor agency under Public Law 103-354 1924-18. For record-keeping purposes, Form FmHA or its

successor agency under Public Law 103-354 402-2, "Statement of Deposits and Withdrawals," should be used to record the deposit of applicant funds for construction with the interim lender and payments of estimates where FmHA or its successor agency under Public Law 103-354 has approved the estimate.

(vi) When the project is substantially complete, the FmHA or its successor agency under Public Law 103-354 loan may be scheduled for closing. A project is substantially complete when it is possible, in accordance with any contract documents, applicable State or local codes or ordinances and the FmHA or its successor agency under Public Law 103-354 approved drawings and specifications, to permit safe and convenient occupancy and use of the buildings. Upon substantial completion, the owner's architect must issue a dated and signed statement certifying to substantial completion. The owner's architect will also prepare and verify a punch list of any minor items of development that need to be corrected and completed.

(vii) The FmHA or its successor agency under Public Law 103-354 loan may be closed, permanent instruments issued to evidence the FmHA or its successor agency under Public Law 103-354 indebtedness and FmHA or its successor agency under Public Law 103-354 loan funds used to retire the interim indebtedness when the project is substantially complete and all bills have been paid. To evidence that there are no unpaid obligations outstanding in connection with the project, the applicant must submit to the servicing official, at or prior to loan closing, signed statements from the contractor, architect, engineer and attorney indicating that obligations for material, labor or services have been paid in full in accordance with their contracts or other agreements, less any funds withheld for minor punch list items. Form FmHA or its successor agency under Public Law 103-354 1924-10, "Release by Claimants," or other similar form may be used for this purpose. If these statements cannot be obtained, the loan may be closed if all of the following can be met:

(A) Statements to the extent possible are obtained.

(B) The interests of FmHA or its successor agency under Public Law 103-354 can be adequately protected and its security position is not impaired.

(C) Adequate provisions are made for paying the unpaid accounts by withholding or escrowing sufficient funds to pay such claims or obtaining a release bond.

(viii) Because interest rates can fluctuate between the time construction estimates are finalized and completion of construction, any excess funds remaining from interim financing will be returned on the FmHA or its successor agency under Public Law 103-354 loan. Also, interim funds remaining because of early completion of construction will be returned. The leftover interest may be used for certain other eligible loan purposes critical to the completion of the project which were unknown to the applicant and contractor at the time the loan was approved, provided prior National Office concurrence is obtained.

(2) *Multiple advances of loan funds.* If interim financing is not available and the applicant supplies such evidence, multiple advances will be used subject to the following:

(i) In cases where relatively large amounts of funds are to be expended for purchases of real estate or for other reasons at the time of closing, separate checks for these purposes may be ordered and endorsed by the borrower to the seller or other appropriate party. This will preclude the necessity for depositing these loan funds in the supervised bank account and reduce the amount of required collateral.

(ii) Except as indicated in paragraph (c)(2)(i) of this section, advances will be made only as needed to cover disbursements required by the borrower for a 30-day period. Normally, there should be no more than 24 advances. These advances should generally be used within 2 years of loan closing. The retained percentage withheld from the contract to assure that construction will be completed in accordance with the contract documents will ordinarily be included in the last advance. Advances will be requested in sufficient amounts to insure that ample funds will be on hand to pay costs of construction, land purchase, legal, engineering or archi-

tectural costs, interest and other expenses as needed. The borrower will prepare Form FmHA or its successor agency under Public Law 103-354 440-11, "Estimate of Funds Needed for 30-day Period Commencing _____," modified as needed, to show the amount of funds required during the 30-day period. This form will be approved by the servicing official or his/her designee.

(iii) After it is determined that the estimate prepared by the borrower is adequate, the advance will be requested through field office terminals in accordance with the MFH user procedure. As an example, for a loan of \$100,000, the advances may be made as follows: Assuming that the loan will be closed on July 1, the borrower will complete Form FmHA or its successor agency under Public Law 103-354 440-11 in sufficient time so that the funds will be available on the day of loan closing. The estimates should be broken down for the first advance in a manner similar to the following:

Construction	\$30,000
Land Acquisition	5,000
Architectural	4,000
Legal	1,000
Total	\$40,000

An advance of \$40,000 would then be available on July 1, the date of loan closing.

(iv) The second advance is also based on the borrower's estimate prepared on Form FmHA or its successor agency under Public Law 103-354 440-11 which must be prepared in sufficient time so that the estimated amount of funds will be available on August 1. This estimate of funds might be broken down as follows:

Construction	\$20,000
Architectural	1,000
Total	\$21,000

(v) When the project is substantially complete in accordance with § 1944.235(c)(i)(vi), schedule final payment to the contractor for disbursement. Withhold funds over the amount needed to cover the costs for correcting or completing the minor items identified from the contractor's final payment in accordance with the requirements of subpart A to part 1924 of this chapter until full performance. Any

funds withheld should be deposited in the supervised bank account so the loan can be fully advanced and AED can be established.

(vi) If funds remain after the loan is fully disbursed and AED has been reached, they must be put into a supervised bank account. The funds cannot be returned on the loan to be drawn later since AMAS will treat as a refund.

(vii) Any deviation from the multiple advance procedure must have the prior approval of the National Office.

(d) *Requesting the check.* When loan approval conditions can be met, including any real estate lien required, and a date for FmHA or its successor agency under Public Law 103-354 loan closing has been agreed upon, the servicing official will determine the amount of funds needed in accordance with paragraph (c)(1) or (c)(2) of this section. The servicing official his/her designee will then order the loan check through field office terminals so that it will be available on or just before the date set for loan closing.

(e) *Increase or decrease in the amount of the loan.* (1) If it is necessary to increase the amount of the loan within the same fiscal year but before loan closing, the loan approving official or servicing official will request that all distributed docket forms be returned to the servicing office. The loan docket will be revised accordingly and reprocessed provided no funds have been disbursed. The State Office, through a field office terminal, must deobligate the existing obligation and enter the new amount to be obligated.

(2) If it is necessary to increase the amount of the loan in the next fiscal year but before loan closing, the servicing official must process a subsequent loan for the amount of increase.

(3) If it is necessary to decrease the amount of the loan before closing, the deobligation will be processed through field office terminals.

(f) *Cancellation of the loan.* Loans may be canceled after approval and before loan closing in accordance with instructions on the Form Manual Insert (FMI) for Form FmHA or its successor agency under Public Law 103-354 1944-53, "Multiple Family Housing Cancellat-

tion of U.S. Treasury Check and/or Obligation."

(1) *Treasury check method.* If the loan check is received in the servicing office, the servicing official will return the check as prescribed in FmHA Instruction 2018-D (available in any FmHA or its successor agency under Public Law 103-354 office), except if the check was issued by the National Finance Center (NFC). If the check was issued by NFC, cancel under FmHA Instruction 2024-A (available in any FmHA or its successor agency under Public Law 103-354 office).

(2) *Notification.* Notify all interested parties of cancellation as provided in subpart B of part 1927 of this chapter.

(g) *Handling the loan check.* The loan check will be handled in accordance with FmHA Instruction 2018-D (available in any FmHA or its successor agency under Public Law 103-354 office and subpart A of part 1902 of this chapter).

(h) *Preoccupancy conference.* To promote proper planning for initial rent-up and occupancy, the servicing official will meet with the applicant and management firm, if any, 90 to 120 days prior to the construction completion date. Among the items that should be discussed are the advertisement of available units, the affirmative fair housing marketing practices, tenant eligibility and tenant selection criteria. The same effort to achieve adequate marketing results will be required for RCH loans except that its completion will be necessary at the loan request stage.

(1) The servicing official will review the applicant's marketing plan to determine that it is complete and all supplemental information is provided. If the plan needs to be modified before marketing activity begins, approval must be granted from the official authorized to approve the loan. The servicing official will review the approved operating budget to determine if it is still adequate for the initial operating period. If it is not adequate, the budget and rent schedule will be revised by the borrower and approved by the loan approval official.

(2) The servicing official should be assured that the applicant will sincerely direct marketing activity in an

effort to attract applications for housing from all groups in the market area determined least likely to apply for the available housing. If it is anticipated that applications for housing may result in a concentration of occupancy by race, color, religion, sex or national origin, outreach efforts will be extended to persons who would not be expected to apply for the housing. The efforts will be conducted for a reasonable period of time prior to the normal period for receipt of applications and commencing not less than 90 days prior to project completion.

(3) Prior to initial occupancy by any person, the servicing official and the applicant will reconvene to assess implemented marketing activity by thoroughly reviewing the marketing plan, and the extent of achievement of plan objectives. If original marketing concepts prove to be less than effective and/or if there are changes in the housing market, the applicant may be required to modify the marketing plan for the project. If the servicing official determines that the applicant is in noncompliance with the plan and a modification to the plan is not warranted, the matter will be referred to the FmHA or its successor agency under Public Law 103-354 Administrator, attention Equal Opportunity Staff Director, through the State civil rights coordinator.

[53 FR 2159, Jan. 26, 1988, as amended at 53 FR 26590, July 14, 1988; 54 FR 39728, Sept. 28, 1989; 55 FR 29561, July 20, 1990; 56 FR 2240, Jan. 22, 1991; 56 FR 67483, Dec. 31, 1991; 57 FR 36590, Aug. 14, 1992; 58 FR 40953, July 30, 1993; 58 FR 44272, Aug. 20, 1993; 59 FR 6890, 6896-6897, Feb. 14, 1994; 59 FR 54788, 54789, Nov. 2, 1994; 62 FR 25065, May 7, 1997]

§ 1944.236 Loan closing.

(a) *Applicable regulations.* RRH loans will be closed in accordance with subpart B of part 1927 of this chapter and any State supplements. Loan dockets for organizations and, in special cases, dockets for individuals will be sent through the State Office to OGC for closing instructions. A profit or limited profit organization or individual applicant may use any designated attorney or title insurance company to close the loan in accordance with the applicable loan closing instructions if

the attorney or title insurance company and its principals or employees are not members, officers, directors, trustees, stockholders or partners of the applicant entity. Nonprofit organizations may use a designated attorney who is a member of their organization if the cost is in accordance with § 1944.212(j) of this subpart.

(b) *Mortgage.* Unless OGC determines the Form to be inappropriate, Form FmHA or its successor agency under Public Law 103-354 1927-1 (state), "Real Estate Mortgage for _____," will be used. For loans to organizations, Form FmHA or its successor agency under Public Law 103-354 1927-1 will be modified as prescribed by or with the advice of OGC with respect to the name, address, and other identification of the borrower, the style of execution and the acknowledgement.

(1) The mortgage or other instrument will contain the following covenant:

The property described herein was obtained or improved through Federal financial assistance. This property is subject to the provisions of Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 and the regulations issued pursuant thereto for as long as the property continues to be used for the same or similar purpose for which financial assistance was extended or for as long as the purchaser owns it, whichever is longer.

(2) When a loan resolution or loan agreement is used, include an additional paragraph in the mortgage to read as follows:

This instrument also secures the obligations and covenants of borrower set forth in borrower's Loan Resolution (Loan Agreement) of (Date), which is hereby incorporated herein by reference.

(3) For a loan to an individual when a loan agreement is not used, additional paragraphs will be included in the mortgage to read as follows:

(i) "Occupancy of the housing and related facilities on the property will be limited to eligible tenants as defined in the regulations of the Farmers Home Administration or its successor agency under Public Law 103-354 unless the Government gives prior written approval to other occupancy."

(ii) "As required by the Government: Borrower will permit the Government to inspect and examine the operation